Honorable Samuel J. Steiner
Chapter 11
Hearing Date: November 12, 2010
Hearing Time: 9:30 a.m.
Hearing Place: Seattle, WA
Response Date: November 5, 2010

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re ADAM R. GROSSMAN, Debtor.	No. 10-19817-SJS MOTION FOR ORDER FOR DISGORGEMENT OF FEES

Jill Borodin ("Ms. Borodin"), a creditor herein, moves this Court for an order for disgorgement of fees of Emily Tsai for failure to comply with 11 U.S.C. §§327 and 2014.

I. Background

The Debtor and Ms. Borodin are parties to a dissolution proceeding currently pending in the Superior Court in King County Case Number 09-3-02955-9 SEA. The state court dissolution trial is set to commence on November 15, 2010.

The Debtor filed his Chapter 11 bankruptcy petition on August 19, 2010 (the "Petition Date"). The Debtor is represented by bankruptcy counsel. On or about September 16, 2010, after the Petition Date, the Debtor retained Emily Tsai to represent him in the upcoming dissolution trial. On or about the time of Ms. Tsai's engagement,

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the Debtor paid Ms. Tsai a retainer of $7,500 with funds borrowed from friends and family members post-petition. See Declaration of Tereza Simonyan. Neither the Debtor nor Ms. Tsai has filed an application for approval of Ms. Tsai's employment as special counsel as required under 11 U.S.C. §§ 327(e) and 2014.

II. Legal Authority

Section 327(e) of Title 11 of the United States Code (the "Bankruptcy Code") allows the trustee in possession to employ a professional for a "specified special purpose" if such representation is in the best interest of the estate, and if such professional does not hold an interest adverse to the estate. 11 U.S.C. § 327(e).

In order to be paid for services rendered to the estate, professionals required to be employed under Section 327 of the Bankruptcy Code must first obtain court approval of their employment. *In re Weibel, Inc.*, 176 B.R. 209, 212 (B.A.P. 9th Cir. Cal. 1994). Federal Rule of Bankruptcy Procedure 2014 governs the procedures for obtaining approval of employment, and requires that the application contain specific facts disclosing to the bankruptcy court "the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee or any person employed in the office of the United States trustee." Fed. R. Bankr. Pro. 2014.

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The detailed disclosure requirements under Fed. R. Bankr. Pro. 2014 are intended to divulge enough information to allow the Bankruptcy Court to evaluate whether the employment of the professional is in the best interest of the estate. *See, e.g., In re Begun*, 162 B.R. 168, 177 (Bankr. N.D. Ill. 1993).

The disclosure rules are applied strictly and literally, even if the results are sometimes harsh. *In re Park-Helena Corp.*, 63 F.3d 877, 881 (9th Cir. 1995) *citing, In re Plaza Hotel Corp.*, 111 B.R. 882, 883 (Bankr. E.D. Cal. 1990). Negligence or inadvertence do not vitiate the failure to comply with the rules. *Id.* Failure to comply with the disclosure requirements gives the court "broad authority to deny any and all compensation," order the disgorgement of all fees, *In re Lewis*, 113 F.3d 1040, 1045 (9th Cir. Cal. 1997), and may even result in sanctions "regardless of actual harm to the estate." *In re Park-Helena Corp.*, 63 F.3d at 881. Disgorgement for nondisclosure is appropriate "irrespective of the payment's source," *In re Lewis*, 113 F.3d at 1046.

III. Analysis

The court should order the disgorgement of all fees paid to Ms. Tsai to date in compensation for the professional services rendered to the Debtor due to the absence of a court approval of her employment.

No application for approval of Ms. Tsai's employment as Debtor's special counsel has been filed. Bypassing the requirement to obtain court approval for employment, the Debtor has failed to disclose vital factual information necessary for the

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Bankruptcy Court to determine whether Ms. Tsai's employment is necessary and in the best interests of the estate. To date, virtually no information is available regarding the terms of Ms. Tsai's employment, and the amount of fees that have been, and are continuously being diverted from the Debtor's bankruptcy estate to Ms. Tsai. In addition, the Bankruptcy Court is still without knowledge whether Ms. Tsai has any connections with creditors or other parties of interest, or whether she holds interests adverse to the estate.

The Debtor is aware of the unambiguous disclosure requirements under Section 327 of the Bankruptcy Code and Fed. R. Bankr. Pro. 2014, and his disregard of the same appears to be deliberate. On September 28, 2010, during the 341 meeting of creditors, the Debtor was asked a set of questions regarding the employment of Ms. Tsai. The Trustee conducting the 341 meeting of creditors stated, on the record, that the employment of Ms. Tsai as special counsel would need to be approved by the court. Although the Debtor's counsel assured the trustee that the employment application was forthcoming, one has not been filed to this date. See Declaration of Tereza Simonyan.

The Debtor's failure to comply with the bankruptcy code requirements for pre-employment approval and the likelihood of disgorgement of fees has also been brought to the attention of Ms. Tsai. On October 10, 2010, two pleadings were filed in the Superior Court dissolution case in which Ms. Borodin, through counsel, informs Ms. Tsai of the procedures that must be followed before an attorney may receive compensation for fees

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incurred in representing a bankruptcy debtor. See **Exhibit A and B** to the Declaration of Tereza Simonyan. Therefore, disgorgement is an appropriate remedy given that Ms. Tsai continues to accept payment of her fees post-petition, despite her knowledge that it is in violation of the Bankruptcy Code.

IV. Conclusion

Ms. Borodin, as a creditor in the current chapter 11 proceeding, requests an order directing Ms. Tsai to disgorge, within 14 days of entry of this order, the retainer in the amount of $7,500, and all other amounts paid by the Debtor to Ms. Tsai to date, to be held in the Court's registry, or any other safeguarded account, and not to be released until so further ordered by the Court.

DATED this 19th day of October, 2010.

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By *__________/s/Tereza Simonyan__________*
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